**"ENGINEER"**

## ARTICLE III - COMPENSATION AND PAYMENT

The Engineer agrees to complete, to the full satisfaction of the Authority, all of the services described herein; and the Authority agrees to pay the Engineer as full compensation for work performed, including all expenses incurred and incidental thereto, an estimated amount not to exceed a Ceiling Price of _____ ($_____.00) dollars including a fixed fee, including general and administrative expenses, in accordance with the schedule shown in Exhibit "A" hereto, or for work to be performed on a task order basis, in accordance with a schedule shown in Exhibit “A” to each task order.

The Ceiling Price is the maximum compensation to be paid for completion of all services including allowable expenses incurred and fixed fee for the scope of work described herein. In no case shall a cost underrun on one phase of this contract be applied to offset a cost overrun on any other phase of this contract unless such modification is approved in writing by the Assistant General Manager for Design and Construction or his designee.

Future Contract Amendments, if any, shall be accounted for and reported separately. In no case shall funds available in one contract amendment be reallocated to any other contract amendment unless such reallocation of funds is approved by the Assistant General Manager for Design and Construction or his designee.

For all services to be performed under this Contract, the Engineer shall be compensated on a cost plus fixed fee basis. The Engineer's costs shall be compensated to the extent provided herein. Such costs shall be reimbursable insofar as such costs are allowable and allocable under the Federal Acquisition Regulations, 48 CFR Chapter 1, Part 31, as amended, and in effect on the execution date of this Contract, which document is incorporated herein and made a part hereof by this reference. The provisions of this section shall apply to any and all Subconsultants under this Contract.

1. Direct Labor Cost

   The Authority shall reimburse the Engineer for the actual salaries paid engineering and technical employees by the Engineer not including salaries or other payments to partners or principals, unless otherwise specifically provided, for the time such employees are directly utilized on the work.

If it is the usual practice for partners or principals to perform certain basic technical work, they must be compensated for the time when they are actually engaged on the work, but only at a rate of pay commensurate with the type of work performed, provided that written approval is obtained from the Assistant General Manager for Design and Construction previous to the use of said principals. Payment of partners and principals for their administrative duties for these positions will not be allowed, it being considered that their salaries are included under the indirect expense item.

Actual direct salary costs, excluding costs of benefits, shall consist of payroll costs at straight time for engineering and technical employees excluding all principals or administrative officers, such as owners, partners, stockholders owning more than one percent of common stock outstanding, or other major supervisory personnel, for the time such employees are directly utilized on the work covered by this Contract.

Premium Time or Overtime shall not be allowed under this contract without the express written approval of the Authority.

It is understood that the current salary policy of the Authority is to limit the hourly rate for engineering and technical employees to $70.00 per hour.

Salary rates paid to employees assigned to this Contract shall be commensurate with salaries paid to other employees of the Engineer engaged in similar work.

Engineering and technical contract employees shall be invoiced to the Authority as regular employees of the Engineer at an imputed direct salary rate commensurate with their qualifications and experience, not to exceed the maximum rate set forth above, plus markup for the approved contract overhead rate and fee.

Any increase in salary for the Engineer's and its Subconsultants' employees assigned to the Contract will be the result of a company-wide evaluation of employees and shall be in accordance with company-wide personnel policies of the Engineer and its Subconsultants, except that salary increases shall be limited to one per year, unless otherwise written approval has been obtained from the Authority. The use of probation and or trial periods of employment coupled with salary increase upon successful completion of such a period will not be allowed. Approval of salary increases shall be awarded no sooner than twelve months after either an individual's start date with the Contract or the effective date of the individual's last salary increase,

whichever is applicable.

Unless written approval is obtained from the Authority, the salary increases in any twelve month period for all individuals working on this Contract shall not exceed a cumulative total of 4 percent for the Engineer.

Proposed promotions must include sufficient written justifications indicating increased responsibilities reflective of the proposed new title. The proposed salary level must be comparable to salaries of those in the same or similar job titles. The Engineer must submit to the Authority the detailed backup for such an increase/promotion, and it shall not be allowed under this contract without the express written approval of the Authority's Project Manager.

Promotions cannot be combined with merit increases.

The Authority shall have the right to exercise the power of review and approval of salaries and increases thereto for a period up to sixty (60) calendar days following receipt of the Engineer's written request of such rates or increases along with justification to ensure compliance with the above limitations. Such rates or increases shall not become effective until at least sixty (60) calendar days after such written request from the Engineer is received by the Authority.

Unless the Authority notifies the Engineer in writing during the sixty (60) calendar day period that such salary rate or increase is, in its opinion, unreasonable, such lack of notice shall constitute approval of the rate or increase from the proposed effective date. All salary changes from those submitted on the previous invoice shall be specifically noted by the Engineer on its next invoice, giving the date of the letter requesting such increase. Changes in the salary rate(s) made prior to the date of such letter will not be approved for payment.

Line items of cost contained in Exhibit "A" are not intended as individual ceilings for the specific costs identified.

2. Indirect Costs

The Authority shall pay the Engineer allowances for the indirect expenses of the home and branch offices of the Engineer at a rate computed in accordance with the applicable cost principles of the Federal Acquisition Regulations, Part 31, in effect on the date of this agreement. The rate used for such computation shall be the audited rate established for the Engineer by its

cognizant U. S. Government Audit Agency, by other audit acceptable to the Authority or based upon a final negotiated rate. Pending final determination of such rate on a fiscal year basis, a provisional rate shall be applied. The provisional rate to be applied during the first fiscal year and thereafter until the audited rate is determined for the first fiscal year is set forth in Exhibit "A". The audited rate for the first fiscal year shall apply as the provisional rate for the second fiscal year and, this procedure shall be followed for the duration of the services. The total maximum percentage of all indirect costs allowed under this Contract shall be limited to a maximum of 155 percent, unless otherwise approved by the Authority. If a new, higher, maximum overhead rate is allowed during the life of this contract, it shall be applicable to Amendments negotiated after the effective date of the new overhead limit. Said limit on allowable indirect costs shall apply notwithstanding any audit which indicates that higher indirect costs were actually incurred. Amounts allowable for subconsultants shall be determined in the same manner.

Note: for Projects using Federal Funds, the Overhead Cap of **155%** shall not apply.

The Engineer shall submit to the Authority's Contract Administration Department the Engineer's most recent audited overhead rate as well as all subconsultants' most recent audited overhead rates on a bi-annual basis (January 1st and July 1st of each year) for the duration of the contract.

If the Engineer or Subconsultant does not have an audited overhead rate in accordance with the Federal Acquisition Regulations by a Certified Public Accountant annually then the Engineer or Subconsultant overhead rate shall be capped at 100% for the year lacking an audited overhead rate.

3. Direct Expenses

The Direct Expenses may include but not be limited to:

a. Travel subsistence;

b. All air travel which shall be approved by the Authority and which shall be coach or economy class;

c. Reimbursable travel expenses which shall include the actual cost of commercial transportation (e.g., taxi, bus, rail, and rental automobiles) required

to perform the work under the Contract away from the employee's base office or location;

d. Other reasonable Contract related costs incurred by the Engineer in connection with work under the Contract and with prior written approval of the Authority;

e. Actual reasonable expenses of lodging and meals which shall be paid beginning with the day of departure from and ending with the day of return to the base office or location to which the employee is assigned. Incidental expenses shall be paid for necessary and usual personal travel expense items. Receipted expenses shall not exceed the per diem rates as set by the U.S. General Services Administration. www.GSA.gov/portal/category/21287

The cost of operating an employee's privately owned automobile, if authorized, will be reimbursed in accordance with the present Engineer company policy, but limited to the standard mileage rate as set by the Internal Revenue Service. Parking fees, tolls, and other charges will be reimbursed on actual cost, receipted basis.

f. With respect to nonexpendable property purchased by the Engineer under this Contract, the Engineer shall adhere to the applicable provisions of 49 CFR Part 18.00 with particular adherence to the property management standards incorporated by Section 18.32 therein. No less frequently than quarterly, or as directed by the Authority, records of such nonexpendable property shall be forwarded to the Authority in such detail as required by the Authority. Further, all such nonexpendable property purchased by the Engineer under this Contract shall become the property of the Authority and shall be transferred to its custody at the Authority's direction.

4. Payments

Partial payments against the Engineer's compensation shall be due and payable monthly for the work performed by the Engineer to the end of the preceding period including a proportionate amount of the fixed fee, as shown on the Engineer's bill accompanied by copies of payroll data certified by authorized employees of the Engineer.

Copies of payroll data submitted by the Engineer shall include the name, classification, dates and hours of engineering and technical personnel labor incurred that

were directly employed on the project. If overtime work is required to maintain the desired time schedule, the overhead factor shall apply to the straight time portion of the premium time rate.

Payment in reimbursement of the Engineer for other direct costs incurred by the Engineer shall be due and payable upon submission and approval of the Engineer's bill accompanied by copies of invoices or other supporting documentation satisfactory to the Authority. The Engineer shall submit a Progress Monitoring Report with each invoice.

The Authority will retain 5 percent of all amounts due for partial payments made against work performed under each phase of this Contract except for amounts due for other direct costs, as part security for the fulfillment of this Contract by the Engineer. Within three invoice periods after completion of each contract phase, and approval by the Authority of all work performed under each phase of this Contract, retainage will be reduced from 5 percent to 0 percent.

All amounts retained during the final phase of the Contract will be paid to the Engineer only after the completion of all services and approval by the Authority of all work performed under each phase of this Contract, or until determination of allowable cost by audit, whichever is later. The Authority shall make a timely request for audit information. The retainage withheld during this final phase will be paid to the Engineer within one year following completion of services, or within one year following submission of requested audit information, whichever is later.

At any time during the execution of the work, the Engineer may substitute and the Authority may accept, in lieu of all retainage held or to be held, a performance bond, letter of credit, or other security satisfactory to and in form approved by the Authority, in an amount equal to the total Contract retainage. This performance bond, letter of credit or other security must be submitted to the Director of Contract Administration. In the event that the contract value increases via amendment then the Engineer shall increase the performance bond or letter of credit value accordingly.

The Engineer must accumulate cost by individual Contract element (i.e. - Base Contract and each Amendment). Additionally, the Ceiling Price and actual costs to date for each Contract element must be provided, when submitting bills with the standard invoice. If multiple Contract elements are combined on one standard invoice, a clear trail into supporting cost documentation by

Contract element must be provided.

Interest shall be assessed to all dollar audit findings when the amount due to the Authority is found to be the result of billings that are disallowed due to the Engineer's noncompliance with federal and state regulations, and/or Contract terms. The rate of interest shall be the sum of the prime rate plus two percentage points as determined on the first month of each calendar quarter. Interest shall be applied to the outstanding amount starting thirty (30) days from the date that the overpayment was brought to the Engineer's attention, and mutual agreement has been reached on the amount due.

5. Right to Audit

All costs and expenses as described in the foregoing paragraphs are to be determined by actual records kept by the Engineer in accordance with the provisions of this Contract and are subject to final audit by the Authority (or its designee) and the FTA. The total partial payments made hereunder shall be adjusted to conform to determinations made in such audit(s). Payments as made to the Engineer shall be subject to adjustments on the basis of audit by the Authority. At their discretion, the Authority and the FTA may undertake interim audits and make retroactive interim payment adjustments as a result of such audits at any time during the term of this Contract.

The Engineer is obligated to maintain in an acceptable form, books, records, and other compilations of data pertaining to the performance of the provisions and requirements of this Contract to the extent and in such detail as shall properly substantiate claims for payment under Contract, including complete employee time and payroll records, as well as documents, papers, and other evidence pertaining to billings to the Authority under this Contract; and shall also maintain records supporting the original cost proposal on this Contract. The Engineer shall make such materials available at its office at reasonable times during the term of this Contract and thereafter for inspection by the various agencies and entities identified in this Section; and copies of such materials shall be furnished upon request of the Authority or its designee or the FTA.

All of the Engineer's records noted above shall be kept for a minimum period of three (3) years after the date of final payment to the Engineer by the Authority as pertains to this Contract or until the resolution of any litigation, claim, negotiation, audit or other action involving the records which arise at any time during the

retention period, whichever is later. All document retention periods start on the first day after final payment under this Contract. If any litigation, claim negotiation, audit or other action involving the records has been started before the expiration of the applicable retention period, all records shall be retained until completion of the action and resolution of all issues resulting therefrom, or until the end of the applicable retention period, whichever is later.

Upon the Authority's request, the Engineer shall provide the Authority with copies of records in computer-readable format as well as hard copy, if the requested information exists in computer readable format.

The Authority reserves the right to audit any other supporting evidence necessary to substantiate charges related to the contract (both direct and indirect costs, including overhead allocations as they may apply to costs associated with the contract).

The Authority reserves the right to audit any of the Engineer's records necessary to permit evaluation and verification of (a) the Engineer's compliance with contract requirements, (b) compliance with the owner's business ethics policies, and (c) compliance with provisions for pricing change orders, payments, or claims submitted by the Engineer's or any of his payees.

The MBTA reserves the right to interview any of the Engineer's current and former employees during the audit.

6. Authority's Right to Withhold Payment

The Authority may withhold payment to such extent as it deems necessary including, but not limited to, the reasons noted below:

a. Proven Third-party claims arising out of the services under the Contract which are made against the Authority;

b. Failure of the Engineer to make payment properly to its Subconsultants;

c. Evidence of fraud, overbilling or overpayment discovered upon audit; or

d. Unsatisfactory performance of the services under the Contract by the Engineer and/or its Subconsultants;

e. An Authority determination that concludes that the Engineer has been overpaid; and

f. Noncompliance with Section 29 of the MBTA's Article II, General Provisions.

Prior to withholding payment, the Authority shall notify the Engineer in writing, and allow the Engineer a reasonable amount of time to satisfactorily address and cure the stated reason for withholding of payment.

7. Prompt Payment

In accordance with the Department of Transportation's Disadvantaged Business Enterprise Regulations 49CFR Part 26; all prime consultants are required to pay subconsultants for satisfactory performance of their contracts no later than ten (10) business days from receipt of each payment that the MBTA makes to the prime consultant.

The Engineer shall also promptly return any retainage payments to the subconsultant within thirty (30) days after the subconsultant's work is satisfactorily completed, and the corresponding retainage is released by the Authority.

The Engineer shall be required to include in the subconsultant contract language assurances that the prime consultant and subconsultant will use appropriate alternative dispute resolution mechanisms to resolve payment disputes.

Any delay or postponement of payments among the parties may take place only for good cause and only with prior written approval from the Authority.

The Authority reserves the right to not reimburse the prime consultant for work performed by any subconsultant (DBE's and non-DBE's) unless and until the prime consultant ensures that the subconsultants are promptly paid for the work they have performed.

The prime consultant may be required to provide certified proof of payment to all subconsultants before any subsequent payments to prime consultants are made by the Authority.

8. Disputed Items

The Authority will use its best efforts to raise questions and identify disputed items with respect to invoiced amounts without delaying the invoice payment process described above. If the Engineer is not able to provide adequate additional information within five-working days of a request by the Authority, the

Authority may reject any individual item and delete it from payment in the current invoice. The Engineer may resubmit the rejected item to the Authority in a subsequent invoice with appropriate supporting material.

**EXHIBIT “A”**

**INTENTIONALLY OMITTED FOR TASK ORDER CONTRACTS**

**An Exhibit “A” will be included in each task order.**